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No. 99-

IN THE

Supreme Court of the United States

SUMMERFIELD HOUSING LIMITED PARTNERSHIP,

Petitioner,

v.

THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Government's acceptance of waste services charged to Summerfield by the County constitutes an uncompensated taking of property in violation of the Fifth Amendment which abrogates the Government's contractual obligation to pay for waste disposal costs.

2. Whether the Federal Circuit's use of state and county law to shift contractual obligations from the Government to Summerfield created irreconcilable conflicts with this Court's and other federal precedents.

STATEMENT PURSUANT TO RULE 29.6

Petitioner is Summerfield Housing Limited Partnership, a Texas limited partnership of which Hunt Building Corporation is the managing general partner, hereinafter referred to as "Summerfield".

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SUMMERFIELD HOUSING LIMITED PARTNERSHIP petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is not reported but is reproduced in the Appendix ("App.") filed with this Petition at App. A. The opinion of the Court of Federal Claims is reported at 42 Fed. Cl. 160 and is reproduced at App. B.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on December 3, 1999 (App. 15a). A Combined Petition for Rehearing and Petition for Rehearing En Banc was denied on February 9, 2000. (App. 49a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the trial court was properly invoked pursuant to 41 U.S.C. § 609.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> * * * nor shall private property be taken for public use without just compensation.

2. Prince George's County, Maryland Code § 2-375(b) (Supp. 1996):

> (b) The special assessment taxes levied by the Council for the costs of garbage and trash collection, removal and disposition, including site acquisition and operation shall be by an ad valorem tax against all of the properties assessed for County tax purposes within the area receiving trash and garbage removal and disposition service. The Council may in its discretion prescribe the method of payment and the rate of tax for the costs of the collection, removal and disposition of the trash and garbage as follows: the basis of said tax to be the total costs of said service divided by the number of units served. The Council may vary the tax rate as between individual residential units and commercial establishments. Such decision as to any variance for such service by the Council shall be conclusive.

3. 10 U.S.C. § 2828(g):

> (g) Appropriations available to the Department for Defense for maintenance of construction may be used for the acquisition of interests in land under this section.

STATEMENT OF THE CASE

On March 29, 1991, the Naval Facilities Engineering Command ("Government") issued a Request for Proposals ("RFP") for the design, construction, and lease of 1242 new

family housing units in Prince George's County, Maryland (the "Facility"). On September 26, 1991, the Government entered into a twenty year lease agreement ("the Lease") with Summerfield Housing Limited Partnership ("Summerfield"). The Lease incorporated the following relevant clause from the RFP ("the Maintenance Obligation"):

> Following issuance of the Certificate of Acceptance for the entire premises by the government, selection of a private waste collection firm for [waste collection] services (including rental of the dumpsters) will be contracted by the government under the maintenance contract for this project.

(App. 28a). Pursuant to the Maintenance Obligation, the Government contracted with a private waste collection firm for the removal of solid waste from the Facility. On May 17, 1996, Prince George's County (the "County") notified Summerfield that a new Solid Waste Service Charge ("the SWSC") would be assessed against property owners to finance County-supplied waste disposal services.

Prior to the enactment of the SWSC, the funds necessary to operate the County's two landfills were generated only by tipping fee charges. However this Court's 1994 *C&A Carbone, Inc. v. Clarkstown*, 114 S. Ct. 1677 (1994) decision prohibited the County from requiring waste haulers to take their solid waste to County-owned facilities. This resulted in an immediate decline in tonnage delivered to County landfills and a concomitant reduction in County revenue. To offset the decline in tipping revenue, the County implemented the SWSC.

The SWSC charges appeared on the County's tax bills to Summerfield because it was the lessor/owner of the Facility. The SWSC contained three separate components: (1) a base benefit charge, (2) a bulky trash charge, and (3) a recycling charge. The SWSC assessed by the County against Summerfield totaled $114,732 per year or $2,294,640 for the twenty year term of the Lease. Summerfield has paid SWSC charges every year since 1996.

There was no dispute that the Government was responsible for waste collection under the Maintenance Obligation. Summerfield contended the SWSC was a maintenance cost which the Lease obliged the Government to pay. Summerfield therefore sought reimbursement from the Government for the first year's SWSC payment. The Government, however, refused claiming that the SWSC was a special assessment tax which Summerfield was required to pay under the Lease.

In 1997, the Government contacted the County to determine whether it would pick up refuse at the Facility. The County refused because it only provided refuse collection for privately owned single family homes. However, the County did agree to provide bulky trash and recyclable waste collection for the Facility. The cost for that collection was billed to Summerfield as part of the SWSC. Because the Government refused to reimburse Summerfield for the bulky trash and recycling components of the SWSC, it received the benefit of the County's services for free.

The United States Court of Federal Claims held the SWSC was a special assessment tax that Summerfield was obliged to pay under the Lease. The United States Court of Appeals for the Federal Circuit affirmed the lower court's

decision and held that 1) Summerfield was responsible for all risks and costs relating to design, construction and ownership of the Facility, and 2) that the SWSC, as a special assessment tax, was a contemplated risk which related to Summerfield's ownership of the Facility. The Federal Circuit also found that the SWSC's enactment, and the Government's refusal to pay it, did not result in the transfer of a contractual obligation from the Government to Summerfield.

REASONS FOR GRANTING THE WRIT

I.

THE FEDERAL CIRCUIT'S DECISION ALLOWS THE GOVERNMENT TO APPROPRIATE SERVICES WHICH BELONG TO SUMMERFIELD WITHOUT JUST COMPENSATION.

The Federal Circuit's unprecedented ruling effectively negates the central constitutional tenet that rights created by contract with the government may be the subject of a Fifth Amendment taking. *See Connolly v. Pension Benefit Guar. Corp.*, 106 S. Ct. 1018, 1025-26 (1986); *Bass Enterprises Production Co. v. United States*, 133 F.3d 893, 896 (Fed. Cir. 1998); Kevin R. Garden, *Fifth Amendment Takings of Rights Arising From Agreements With The Federal Government*, 29 PUB. CON. L. J. 187 (2000). In this case, the Government's obligation to pay for solid waste collection during the term of the Lease is a cognizable right created by its binding agreement with Summerfield. The Government has interfered with that right by receiving free bulky trash and recyclable waste collection services from the County without compensating Summerfield for the cost of that service.

At the time the Lease was signed in 1991, Summerfield had no reasonable expectation that the Government would refuse to live up to its Maintenance Obligation. Indeed, there is no Lease provision which requires Summerfield make County waste disposal services available to the Government. The Federal Circuit's decision thus effectively placed the Government in Summerfield's shoes and permited it to appropriate the bulky trash and recyclable services provided by the County to Summerfield. *See Omnia Commercial Co. v. United States*, 43 S. Ct. 437, 438 (1923) (the Fifth Amendment "has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power."); *767 Third Ave. Assoc. v. Sage Realty Corp.*, 48 F.3d 1575, 1581-82 (Fed. Cir. 1995) (approving *Omnia* analysis); *Brooks-Scanlon Corp. v. United States*, 44 S. Ct. 471, 473 (1924); *Fifth Amendment Takings*, 29 PUB. CON. L.J. at 206. Stated another way, the decision erroneously allowed the United States to breach its Lease agreement with Summerfield.

The effect of the Federal Circuit's decision is not limited to this case, however, in that it potentially undermines every lease agreement drafted by the Government between it and private investors. If the decision stands, lessors who enter into such agreements with the Government will now be penalized for "risks" which could not have been contemplated at the time the lease agreements were signed. This result undercuts the Government's intent that such leases be designed to assure private contractors that the government will carry specific costs for the term of the lease. The design of these leases also encourages competition, ensures the government will obtain the best housing for its money, and protects the private contractor from unforeseen

contingencies that would contradict or vary the basic terms of the agreement.[1]

II.

THE DECISION OF THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT CONFLICTS WITH DECISIONS OF THE SUPREME COURT, THE FEDERAL CIRCUIT COURT AND THE COURT OF FEDERAL CLAIMS.

The Federal Circuit decision improperly allowed the Government to utilize state law to transfer part of the Maintenance Obligation to Summerfield in violation of the Lease's specific terms. The ramifications of the decision in this case are nevertheless far-reaching and should be of concern to this Court. Indeed, if a county code can be used to amend a federal government contract, as the trial and

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1. The RFP itself reflects these competitive and risk allocation values:

> The Section 801 Build-to-Lease housing program as amended, Title 10 U.S. Code 2828(g), as amended, provides the Armed Services with a cost effective means of acquiring housing using private sector experience and funding. The successful offeror will build the units to the specifications set forth herein and will lease them to the Government for a 20-year lease term, exclusive of the construction period. The Government will operate and maintain the units through the 20-year term. . . . The Government intends to select a developer based on a technical and cost competition. Maximum annual rental cannot exceed $11,811,610 per year for a 1242 unit project. This amount does not include utility consumption or property maintenance expenses, which the Government will pay.

appellate courts held in this case, identical contractual provisions would be subject to innumerable conflicting interpretations based solely on the location of the property at issue.

It is axiomatic that when the Government contracts, such contracts are governed by common law and federal contract law. *Alvin, Ltd. v. United States Postal Service*, 816 F.2d 1562, 1564, 1567 (Fed. Cir. 1987); *Wright Runstad Properties, Ltd. Partnership v. United States*, 40 Fed. Cl. 820, 824 (1998). In *Alvin*, the Federal Circuit further affirmed the controlling rule of construction as "the mutual understanding of the parties prevails even where the contractual term has been defined differently by statute or administrative regulation." *Alvin*, 816 F.2d at 1567 (relying on Restatement (Second) of Contracts, § 201 cmt. c). The Federal Circuit's decision in this case therefore contradicts its prior jurisprudence because it utilized a county statute to impair the parties' basic bargain and contractual obligation that, under the Lease, the Government bore the cost of solid waste disposal at the Facility.

The Federal Circuit compounded its error by using Maryland law to define the term "special assessment". (App. 9a-11a). In this case, however, the "special assessment" was a special assessment in name only and nothing more than a tipping fee in reality. In fact, the SWSC did not fall under the Government's own explanation of "special assessment" in the RFP.[2] In short, pursuant to this

2. The Government defined the meaning of "special assessment" in a written response to an offeror's question as "generally a one-time assessment for improvements or a requirement for approval of the development." (App. 3a-4a).

Court's precedents and the Lease terms, the Federal Circuit should have refused to allow a state or county law to change the parties' bargained-for and anticipated allocation of risks contained in the Lease.

Ironically just five years before the instant decision, the same trial judge held that the terms of the lease, *not* state law, controlled the interpretation of a similar government lease provision. *See North Star Alaska Housing Corp. v. United States*, 30 Fed. Cl. 259 (1993) (Futey, J.). In *North Star*, Judge Futey addressed a lessor/lessee disagreement with regard to the payment of refuse collection fees at Alaska. In that case, the lease obligated the Government to pay for all utilities while refuse collection was defined as a maintenance and operational responsibility of the lessor. The *North Star* lessor relied on an Alaska statute that specifically defined refuse collection as an "utility" in an attempt to shift the responsibility to the Government.

In *North Star*, Judge Futey held that the lessor's analysis created inconsistencies within the contract. He also held it was unreasonable to define refuse collection as an operational service under one section of the contract when it was defined as a utility under another. *North Star* at 268. Significantly, Judge Futey also concluded that even if the court were to accept the lessor's position, that is that refuse collection could reasonably be included on the list of utilities, the lessor's interpretation would still ignore other sections of the contract which expressly define refuse collection as an "operational service." *North Star* at 276.

In *North* Star, Judge Futey rejected the notion that reference to state law should be used to interpret the meaning of a federal contract, and further acknowledged that when

"general and specific [contract] provisions are inconsistent, the specific contract provision will prevail." such that "[p]rovisions must be read harmoniously and not conflicting to avoid rendering any portion of the contract meaningless." *Id. citing Unicon Management Corp. v. United States*, 375 F.2d 804, 806 (1967) and *Hol-Gar Mfg. Corp. v. United States*, 169 Ct. Cl. 384, 388, 351 F.2d 972 (Ct. Cl. 1965). Contrary to his *North Star* analysis, in this case Judge Futey held that the RFP, which expressly defines solid waste collection as "maintenance", could be ignored because Prince George's County law classified the SWSC as a special assessment. By affirming Judge Futey's decision, the Federal Circuit explicitly approved such inconsistent results.

The Federal Circuit also created an irreconcilable conflict in its own jurisprudence when it erroneously distinguished the instant case from its *Alvin* opinion and affirmed the trial court's analysis that "the instant was distinguishable from *Alvin* because, the original tipping fees were not replaced by the SWSC. Rather Plaintiff's own documents demonstrate that the County continues to charge tipping fees." (App. 40a). This distinction is inaccurate and does not reflect the fact that the fees and assessments at issue in *Alvin* were charged *in addition* to the property taxes the Postal Service had agreed to pay. *See Alvin* at 1565. Indeed the Court's decision in *Alvin* did not hinge on whether the special assessment was a total or partial replacement for the original tax, but instead on whether it went to pay for services previously funded by the original tax. *Alvin* at 1564-65.

The instant record establishes that the SWSC was a direct replacement for tipping fee revenues lost due to the *Carbone* decision, and was implemented to fund the same services previously funded by tipping fees. The original bargain of

the parties contemplated the Government would pay for solid waste disposal regardless of how that expense was classified by the County. *See Alvin* at 1566.

The Court of Federal Claims' decision, as affirmed by the Federal Circuit, also seriously damages other well-established federal rules of contract construction. This Court has held that a cardinal principle of contract construction requires that the contract be read to give effect to all its provisions and to render them consistent with each other. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1219 (1995); *Lockheed Martin IR Imaging Sys., Inc. v West*, 108 F.3d 319, 322 (Fed. Cir. 1997) (contract provisions must be read as part of the whole, according reasonable meaning to all contract terms). In this case, however, the Federal Circuit ignored this Court's and its own precedents, by using a general contract provision to effectively negate the very specific Maintenance Obligation. *Compare with North Star*, 30 Fed. Cl. at 267 (specific provisions in contract control over more general provisions).

The Federal Circuit also ignored the rule of *contra proferentum* which provides that the contract must be construed against its drafter if the interpretation advanced by the non-drafter is reasonable, and this Court's exhortation that interpretation against the drafter is even more favored when the government dictates the terms of the contract. *See Mastrobuono*, 115 S. Ct. at 1219; *United States v. Seckinger*, 90 S. Ct. 880 (1970) (contracts more favorably construed against government); *Lockheed Martin*, 108 F.3d at 322 (defining and approving *contra proferentum* rule of construction); *United States v. Turner*, 819 F.2d 283, 286 (Fed. Cir. 1987).

The central dispute in this case does not arise out of circumstances which existed at the time of the Lease's formation, but rather out of an unforeseen enactment to county law which occurred almost four years later. In ascertaining whether that change could be accommodated, the original intent of the parties must be upheld. *See Alvin* at 1565. Payment of the SWSC by the Government reinstates the original bargain as it was understood by both the Government and Summerfield.

More than fifty years ago, Justice Jackson observed that "[i]t is very well to say that those who deal with the Government should turn square corners . . . [b]ut there is no reason why the square corners should constitute a one-way street." *Federal Crop Ins. Corp. v. Merrill*, 68 S. Ct. 1, 5 (1947) (Jackson, J., dissenting). This view supports the modern jurisprudence of this and other federal courts. *See Alvin* at 1566. For all these reasons, Summerfield respectfully requests the decision of the Federal Circuit should thus be reversed.

CONCLUSION

For the reasons set forth the above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — DECISION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED AND DECIDED DECEMBER 3, 1999

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

99-5033

SUMMERFIELD HOUSING LIMITED PARTNERSHIP,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

DECIDED: December 3, 1999

Before MICHEL, *Circuit Judge*, SMITH, *Senior Circuit Judge*, and SCHALL, *Circuit Judge*.

SCHALL, *Circuit Judge*.

DECISION

Summerfield Housing Limited Partnership ("Summerfield") appeals the decision of the United States Court of Federal Claims that granted summary judgment in favor of the United States in Summerfield's suit against the United States for additional compensation and declaratory relief under a lease agreement between Summerfield and the government. The Court of Federal Claims held that an annual

Appendix A

Solid Waste Service Charge ("SWSC") assessed by the Department of Environmental Resources ("DER") of Prince George's County, Maryland, is a special assessment tax which Summerfield is obligated to pay under the lease. *See Summerfield Housing Ltd. Partnership v. United States*, 42 Fed. Cl. 160 (1998). We *affirm*.

DISCUSSION

I.

A.

The pertinent facts are not in dispute. On March 29, 1991, the Department of the Navy ("Navy") issued Request for Proposal ("RFP") No. N6247791RP00017 for the construction of, among other things, 1,242 family housing units in Prince George's County, Maryland. The RFP provided that the successful offeror would be required to build the units and then lease them to the government for a 20 year period. The RFP further provided that the maximum annual rental for the project set forth in the RFP did "not include utility consumption and property maintenance costs, which will be paid by the Government." The RFP stated:

> The fixed rent includes the successful offeror's return, debt service, property taxes, and insurance. The Government will pay the successful offeror 100 percent of all increases in property taxes and insurance premiums after the second year of full occupancy. The Government will manage and maintain the units and pay all utility consumption costs directly.

Appendix A

The RFP also stated that the offeror would contact a local private waste collection firm to incorporate the requirements for a solid waste collection system in its project design. According to the RFP, upon issuance of a "certificate of acceptance for the entire premises by the government, selection of a private waste collection firm for these [solid waste collection] services (including rental of the dumpsters) will be contracted by the government under the maintenance contract for this project." The RFP also included a copy of the actual lease, which was to take effect once the government accepted the construction work.

On May 24, 1991, the Navy issued written responses to questions submitted by potential offerors. The first question and answer read:

> Q. Will tax increases incurred by the Government after the second year of the Lease include special assessments and taxes for special services?
>
> A. The Government will pay increases in the general real estate taxes after the second full year of occupancy. General real estate taxes as defined in Article III.D., page H-7, of the Lease Agreement, are taxes which are assessed on an *ad valorem* basis against all taxable real property without regard to the benefit to the property, for the purpose of funding general governmental services. *A "special assessment" is generally a one-time assessment for improvements or a requirement for approval of the development and*

> *does not meet the definition of a "general real estate tax" as used in this Lease Agreement.* Therefore, *the Navy does not have the authority or obligation to pay such a fee.*

(emphasis added). The term "special assessment" is not defined in the RFP or the lease.

The contract was awarded to the Hunt Building Corporation ("Hunt") on September 26, 1991. Hunt assigned its interest in the lease to Summerfield on December 1, 1995. In due course, the government contracted with a private firm for solid waste collection services.

The lease, which remains in effect, incorporates the terms and conditions of the RFP and Hunt's proposal. Article III of the lease, dealing with "RENT," provides, in pertinent part, as follows:

> C. Rent reflects the cost of ownership to the Lessor for newly-constructed facilities provided to the Government over the term of the lease including, but not limited to, the cost of land, improvements, property taxes, utility connection fees, insurance, the cost of borrowing money, and profits earned thereon. Rent shall be fixed for the lease term with the exception of general real estate tax and insurance increases after the second full year following issuance of the Certificate of Acceptance for the entire Premises by the Government.

Appendix A

D. TAX INCREASES

1. After the completion of the second full year following the date of issuance of the Certificate of Acceptance for the entire Premises, the Government shall pay all general real estate tax increases. . . .

2. In the event of any decreases in general real estate taxes occurring during the lease term, the rental amount shall be reduced accordingly. . . . *Any special assessments of real estate tax surcharges imposed upon the Premises before, during, or after the term of this lease shall be and remain the responsibility of the Lessor.*

3. General real estate taxes are taxes which are assigned on an *ad valorem* basis, without regard to benefit to the property, for the purpose of funding general governmental services. The term "general real estate taxes" shall exclude any fine, interest or penalty for non-payment, but shall include any discount offered for prompt payment whether the Lessor has taken advantage of it or not.

(emphasis added).

Article V of the lease, dealing with "OCCUPANCY PROVISIONS," states, in pertinent part, as follows:

Appendix A

C. UTILITIES, RATES, CHARGES, TAXES, AND ASSESSMENTS

* * *

> *Lessor shall be responsible to pay* all taxes, general or special, all public rates, dues, and *special assessments of every kind* which may become due and payable or which are to be assessed against or levied upon said premises during the term of this lease.

(emphasis added).

Article XX of the lease, entitled "COMPLIANCE WITH LAWS AND REGULATIONS," states that "the Lessor will at all times during the existence of this lease comply, at its sole cost and expense, with the provisions of any and all federal, state and local statutes, ordinances, rules, and regulations which may be applicable to the premises or any part thereof."

Finally, Article XXI.A. of the lease, dealing with "CHANGES," provides that:

> A. It is expressly understood that all risks and costs relating to design, construction, and ownership[1] of the facilities shall be borne solely by the Lessor. These risks and costs which must

1. The wording of this provision was changed from "operation, and maintenance" to "ownership" by a contract modification.

be completely assumed by the Lessor include but are not limited to delays, differing site conditions, changed conditions, changed circumstances, suspension of work, changes in labor rates or taxes or any constructive change.

B.

On June 27, 1995, the Prince George's County Council ("County Council") enacted an emergency bill entitled "Special Assessments in Urban Areas" for the purpose of establishing "special assessments . . . relating to recyclables, garbage and trash." The special assessment was enacted under Section 2-375(b) of the Prince George's County Code, which provides as follows:

> (b) The special assessment taxes levied by the Council for the costs of garbage and trash collection, removal and disposition, including site acquisition and operation shall be by an ad valorem tax against all of the improved properties assessed for County tax purposes within the area receiving trash and garbage removal and disposition service. The Council may in its discretion prescribe the method of payment and the rate of tax for the costs of the collection, removal and disposition of trash and garbage as follows: the basis of the tax to be the total costs of said service divided by the number of units served. The Council may vary the tax rate as between individual residential units and commercial establishments. Such decision as to any variance

> for such service by the Council shall be conclusive.

On May 17, 1996, Summerfield was notified by the Director of the DER that it would be assessed an SWSC in the fiscal year 1997 county tax bill. The Director explained that "[b]ecause the County can no longer fund the costs associated with its solid waste programs solely from tipping fee revenues, several service charges have been implemented to help fund the system." He added that the SWSC was designed to "provide a more stable revenue source and decrease the fluctuations in revenues available for solid waste programs." The SWSC appeared on Summerfield's county tax bills as a separate line item, and totaled $114,732 for fiscal year 1997.

The SWSC encompasses three different charges: 1) the Base Benefit Charge; 2) the Bulky Trash charge; and 3) the Recycling Charge. The Base Benefit Charge "[c]overs the cost of the solid waste system infrastructure the County must maintain to handle solid waste in the County." It also covers environmental controls, support facilities, and administrative offices. The Bulky Trash Charge "[c]overs the cost of providing bulky trash collection." The Recycling Charge "[c]overs the cost of providing curbside collection of recyclables . . . as well as costs for other programs."

C.

Summerfield timely paid the SWSC and sought reimbursement from the Navy for the amount of the charge. After the contracting officer denied the claim, Summerfield

filed suit in the Court of Federal Claims seeking to recover the $114,732 it had paid for fiscal year 1997 and a declaratory judgment that the Navy is obligated to pay the SWSC for the remaining term of the lease. In due course, Summerfield and the government cross-moved for summary judgment. In granting the government's motion, the court concluded that the SWSC is a special assessment tax that Summerfield must pay under the terms of the lease.

The term "special assessment" is not defined in the RFP or the lease. Accordingly, the court noted that "both parties have focused on Maryland law" to define "special assessment." Under Maryland law, a special assessment "is a tax levied occasionally as may be required upon a limited class of persons interested in local improvement, and who are presumed to be benefited by the improvement over and above the ordinary benefit which the community in general derive[s] from the expenditure of the money." *Williams v. Anne Arundel County*, 638 A.2d 74, 78 (Md. 1994). "In order to justify a special assessment for a local improvement, however, there must be both a public purpose and a special benefit to the properties to be assessed over and above that accruing to the public." *Montgomery County v. Schultze*, 489 A.2d 16, 20 (Md. 1985). "Special assessments are . . . imposed because the improvement for which the assessment is levied causes an enhancement of the property's value, with no pecuniary loss suffered by the property owner." *Id.*

Applying the Maryland law definition of "special assessment," the court rejected Summerfield's argument that the SWSC is not a special assessment because Summerfield has received no special benefit. Citing *Pumphrey v. County*

Comm'rs, 130 A.2d 297 (Md. 1957), the court concluded that the determination of the existence of a special benefit is a matter within the discretion of the County legislature.

II.

A.

Summerfield acknowledges that the SWSC is properly classified as a special assessment under Maryland law. It argues, however, that Maryland law does not control the result in this case and that the parties did not intend that a charge like the SWSC be viewed as a special assessment.

In support of its argument, Summerfield points to the government's response to one of the pre-bid questions it received concerning the RFP, in which, as noted above, the government stated that it would not pay "special assessments" and that "special assessments" are "generally a one-time assessment for improvements or a requirement for approval of the development." Since the SWSC was neither a one-time assessment nor a requirement for approval of the development, Summerfield contends that the SWSC is not a special assessment within the contemplation of the parties. We are not persuaded by this argument. The government's response did not limit the definition of special assessments. It merely described characteristics that special assessments "generally" have.

Article XX of the lease requires "the Lessor . . . [to] comply . . . with the provisions of any and all . . . state and local statutes, ordinances, rules, and regulations which may

be applicable to the premises or any part thereof." The SWSC was a creation of Maryland law, enacted by the Prince George's County Council. It was assessed on land owned by Summerfield in Prince George's County, and it appeared as a separate line item on Summerfield's Prince George's County real property tax bill. Thus, it is appropriate to look to Maryland law in determining whether the SWSC is a special assessment.

Finally, in Article V.C. of the lease, the parties agreed that Summerfield would pay "special assessments of every kind." In addition, pursuant to Article XXI of the lease, Summerfield was responsible for bearing "all risks and costs relating to design, construction, and ownership of the facilities." We believe that the risk that the County would experience a revenue shortfall from a loss in tipping fees at its dumps and thereafter enact a special assessment to make up this shortfall — which is what occurred in this case — is a risk "relating to . . . ownership of the facilities."

In sum, because the SWSC is a special assessment under Maryland law and because the lease requires Summerfield to pay "special assessments of every kind," Summerfield is the proper party to pay the SWSC.

B.

Summerfield argues that, even if the SWSC is a special assessment, our decision in *Alvin, Ltd. v. United States Postal Serv.*, 816 F.2d 1562 (Fed. Cir. 1987) compels a ruling in its favor. Summerfield's reliance on *Alvin* is misplaced, however.

Appendix A

Alvin involved long-term lease agreements between thirty limited partnerships ("Alvin") and the United States Postal Service ("Postal Service") with respect to various facilities in California. The lease agreements required Alvin to pay special assessment taxes and the Postal Service to pay general real estate taxes. *See id.* at 1563. After the lease period began, Proposition 13 changed the California Constitution to require that *ad valorem* taxes on real property not exceed 1% of the assessed value of the property. *See id.* The result was an immediate reduction of community revenue from *ad valorem* real estate taxes. *See id.* Communities in California responded by invoking alternative revenue collection methods, in the form of special assessments. *See id.*

For the tax years 1978 to 1981, the Postal Service paid the reduced general real estate taxes and some of the new special assessments. *See id.* at 1564. After 1981, however, the Postal Service refused to pay anything other than taxes denominated "general real estate taxes" that were assessed on an *ad valorem* basis. *See id.* Consequently, the Postal Service's lease costs decreased, with corresponding increases in costs to Alvin. *See id.* After the Postal Service denied Alvin's claim for reimbursement of the special assessment charges, Alvin appealed to the Postal Service Board of Contract Appeals ("Board").

The Board denied Alvin's appeal. It concluded that Alvin had "assum[ed] . . . the risk that a third party — the state or local governments — would change the method through which revenues were raised." *Id.* at 1564. Therefore, the Board ruled that while the Postal Service "bore the risk of

increases in general real estate taxes, [Alvin] assumed the risk that its obligation for other revenue raising devices would be increased." *Id.*

On appeal, this court reversed the decision of the Board. In so doing, we stated that the Board had "treated the question of contractual intent solely as whether the Postal Service intended to pay for the levies denominated 'special assessments,' whatever their genesis or scope . . . . Therein lies its error." *Id.* at 1565. We reasoned that "[t]he dispute arises not out of the circumstances at the time of formation of these contracts, but out of a change in state law enacted up to 25 years later." *Id.* "In ascertaining whether such a change may be accommodated, the original intention of the parties must be considered." *Id.*

As far as the special assessments were concerned, we pointed out that "the Postal Service offered no evidence of contemporaneous recognition that such a dramatic change in tax structure was a reasonable possibility." *Id.* We also pointed out that the special assessments appeared on Alvin's tax bills for the same services that previously were funded by *ad valorem* real estate taxes. *See id.* at 1565. The new special assessments were collected at the same time and in the same manner as the *ad valorem* real estate taxes, operated in a manner similar to a tax lien, and applied to all or substantially all of the property within a local jurisdiction. *See id.* at 1565-66. Accordingly, we concluded that "the Postal Service's undertaking to pay general real estate taxes requires the payment of those levies that succeeded the general real estate taxes, however these successor taxes are denominated." *Id.* at 1566. "Such payment reinstates the

original bargain, as it was understood by both the Postal Service and the lessors." *Id.*

The critical point is that, in *Alvin*, the special assessments that the Postal Service refused to pay were imposed to make up for the reduction of revenue in general real estate taxes that was caused by the passage of Proposition 13, a reduction that the Postal Service benefited from because it was obligated under the leases to pay general real estate taxes. The Postal Service's refusal to pay the special assessments in *Alvin* thus had the effect of transferring to Alvin an obligation that the parties originally agreed was the Postal Service's. That is not the case here. The enactment of the SWSC and the Navy's refusal to pay it did not result in the transfer of a contractual obligation from the Navy to Summerfield. Thus, *Alvin* is very different from the case at bar.

For the foregoing reasons, the decision of the Court of Federal Claims is affirmed.

Each party shall bear its own costs.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

99-5033

SUMMERFIELD HOUSING LIMITED PARTNERSHIP,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

JUDGMENT

ON APPEAL from the UNITED STATES COURT OF FEDERAL CLAIMS

in CASE NO(S). 97-CV-423

This CAUSE having been heard and considered, it is

ORDERED AND ADJUDGED: ***AFFIRMED***

ENTERED BY ORDER OF THE COURT

DATED DEC 03 1999

s/ Jan Horbaly
Jan Horbaly, Clerk

APPENDIX B — OPINION OF THE UNITED STATES COURT OF FEDERAL CLAIMS DATED AND FILED OCTOBER 29, 1998

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 97-423C

(Filed October 29, 1998)

SUMMERFIELD HOUSING LIMITED PARTNERSHIP,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

* * *

OPINION

Futey, Judge

This contract case is before the court on plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment. Plaintiff claims that, according to the terms of a lease agreement with defendant, defendant is obligated to pay an annual Solid Waste Service Charge (SWSC) assessed by the Department of Environmental

Resources (DER) of Prince George's County, Maryland (the County). Plaintiff seeks the amount it has paid for the SWSC to the County to date, as well as a declaratory judgment stating that defendant is obligated to pay the SWSC over the remaining years of the lease. Plaintiff also maintains that defendant owes additional interest for late rental payments. Defendant alleges the SWSC is a special assessment tax, and therefore, plaintiff is obligated to pay it under the lease. Defendant further maintains that plaintiff is not entitled to the additional interest it seeks.

Factual Background

On March 29, 1991, the Department of the Navy (defendant) issued a request for proposals (RFP) no. N6247791RP00017 for the design, construction and lease of: (1) 1,242 new housing units; (2) an 8,650 square foot community center; (3) a thirty-four acre park; (4) an 8,000 square foot management/maintenance facility; and (5) three 450 square foot meeting rooms on a site in the Landover area of Prince George's County, Maryland (the Facility). The RFP contained a form of lease agreement to be executed for a period of twenty years commencing upon the date of issuance of a Certificate of Acceptance from the contracting officer (CO).

The contract was awarded to Hunt Building Corporation (Hunt) on September 26, 1991. Construction began after the lease was entered into. On August 25, 1993, defendant executed an Estoppel Certificate and Consent, in which defendant agreed to make all rent payments under the lease directly to Texas Commerce Bank-El Paso, N.A. (Texas

Commerce Bank), as plaintiff's trustee, after issuance of the Certificate of Acceptance. At approximately the same time, Texas Commerce Bank executed a Notice of Assignment of Rents (Notice of Assignment) under the lease, directing the CO to remit rental payments to Texas Commerce Bank when payment commenced upon the issuance of the Certificate of Acceptance.[1] On August 25, 1993, the CO acknowledged receipt of the Notice of Assignment and a copy of the instrument of assignment executed by Hunt. Further, on December 1, 1995, Hunt assigned its right, title and interest in the Facility to plaintiff.[2] On that same day defendant issued a Certificate of Acceptance, establishing the commencement of the twenty-year lease term.

Pursuant to the lease, defendant is required to pay plaintiff rental payments in monthly arrears, with payment due on the first workday of the month.[3] The lease also provides that rent consists of the fixed rent as well as increases in the required insurance and property taxes.[4] The lease further provides in pertinent part:

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1. *See* Plaintiff's Motion for Summary Judgment (Pl's. Mot.) Exhibit (Ex.) E. It is unclear exactly when Texas Commerce Bank executed the Notice of Assignment. The only date contained in that document is the date Hunt executed the instrument of assignment. The date is handwritten and appears to read August 27, 1993. The CO, however, acknowledged receiving the Notice of Assignment and a copy of the instrument of assignment from Texas Commerce Bank on August 25, 1993.

2. Hunt is the managing general partner of plaintiff.

3. Pl.'s Mot., Ex. A, at 45.

4. ***Id.*** at 3.

Appendix B

> Rent reflects the cost of ownership to the Lessor for the newly-constructed facilities provided to the Government over the term of the lease including, but not limited to, the cost of land, improvements, property taxes, utility connection fees, insurance, the cost of borrowing money, and profits earned thereon. Rent shall be fixed for the lease term with the exception of general real estate tax and insurance increases after the second full year following issuance of the Certificate of Acceptance for the entire Premises by the Government.[5]

In addition, the lease provides that in the event that a rent payment is late, defendant automatically must pay interest on the amount outstanding.[6]

A. Solid Waste Service Charge

Pursuant to the lease, defendant agreed to contract with a private waste hauler for the removal of refuse from the Facility. On October 27, 1995, defendant modified an existing contract with Priority One Services, Inc. (Priority One), a private solid waste hauler, to include the collection, removal and disposition of refuse from the Facility. After contracting with Priority One, defendant inquired with the DER about the County's refuse collection service. In a letter dated September 3, 1997, from Maclane Gibson of the DER

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5. ***Id.*** at 3-4.

6. The parties agree the applicable interest rate is 7%, as published in the Federal Register. 61 Fed. Reg. 37794 (1996).

to the CO, Mr. Gibson stated that the County only provided collection services to privately owned single family homes, and also would not be able to provide refuse dumpsters for defendant to use. He stated, however, that the County could collect bulky trash and recyclable garbage from the residents at the Facility.

By letter on May 17, 1996, Samuel Wynkoop, Jr., Director of the County DER, informed plaintiff of the new SWSC that the County instituted on July 1, 1995. Prior to July 1, 1995, only tipping fees were charged to users of the County's two landfills. The letter states in part:

> In 1994, a Supreme Court Ruling [***C & A Carbone, Inc. v. Clarkstown***, 511 U.S. 383 (1994)], invalidated a County law requiring waste haulers to dispose of solid waste collected in Prince George's County at County-owned waste acceptance facilities. The result of this decision was an immediate decline in tonnage delivered to County landfills and a subsequent reduction in revenue.
>
> Because the County can no longer fund the costs associated with its solid waste programs solely from tipping fee revenues, several service charges have been implemented to help fund the system. These charges, which appear as the "Solid Waste Service Charge" (SWSC) on the County tax bills, provide a more stable revenue source and decrease the fluctuations in revenues available for solid waste programs. These charges will be

assessed to all single family and multifamily dwellings in the County.[7]

On July 15, 1996, plaintiff received a tax bill from the County, for the tax year July 1, 1996 through June 30, 1997, which included the new SWSC. Pursuant to the implementation of the SWSC, the DER assessed three separate charges against plaintiff for the Facility: (1) a base benefit charge amounting to $50.00 per unit for all single family homes and apartments; (2) a bulky trash charge amounting to $18.00 per unit for all single family homes and apartments; and (3) a recycling charge amounting to $50.00 per unit for single family homes and apartments.[8]

Based upon this criteria, the SWSC assessed against plaintiff amounted to $114,732.00 per year. On September 13, 1996, Ronald Pyke (Controller of Hunt), on behalf of plaintiff, sent the CO a letter that included both a copy of plaintiff's tax bill from the County and a letter from Mr. Wynkoop. Specifically, Mr. Pyke stated that plaintiff believed the SWSC was an operating expense under the lease, and therefore defendant's obligation to pay. Additionally, Mr. Pyke stated that plaintiff would advance the funds to pay the amount due, but that plaintiff wanted to be reimbursed by defendant. Plaintiff paid $114,732 to the County for the SWSC on September 23, 1996 for the July 1996 to June 1997 tax year. By letter dated January 9, 1997, the CO denied Mr. Pyke's request. On February 4, 1997,

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7. Pl.'s Mot., Ex. K, at 1.

8. ***Id.*** at 3-8; ***see also id.***, Ex. L.

plaintiff filed a claim with the CO seeking reimbursement for the SWSC and asking for a final decision on the matter. On April 3, 1997, the CO denied plaintiff's claim. Specifically, the CO determined the SWSC imposed by the County was a special assessment tax as defined under Maryland law, and therefore, it was plaintiff's obligation to pay under the lease. Plaintiff paid $114,732 to the County for the SWSC for the July 1997 to June 1998 tax year on or about September 30, 1997.

B. Rental Payments

On December 19, 1995, approximately two weeks after defendant issued the Certificate of Acceptance, plaintiff sent the CO a letter authorizing and directing defendant to make all rental payments and other sums due under the terms of the lease directly to Texas Commerce Bank, as trustee for plaintiff.[9] On April 18, 1996, the CO modified the lease, identifying Texas Commerce Bank as the assignee of plaintiff's lease payments, and further identifying the Defense Finance and Accounting Service (DFAS) as the disbursing office. Significantly, the modification incorporated the Notice of Assignment previously executed by Texas Commerce Bank in August, 1993. The CO sent this modification to DFAS on the same day. According to the record, however, DFAS did not receive a copy of the modification until May 20, 1996. Plaintiff received its copy of the modification on April 29, 1996.

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9. It appears plaintiff sent this letter as a reminder to remit payments to Texas Commerce Bank, as previously delineated in the Notice of Assignment, executed in August, 1993.

Defendant continued to make rent payments to Hunt up to and including May 1996. Defendant asserts that sometime in April or May of 1996, DFAS learned of the purported assignment, at which time it requested copies of the Notice of Assignment and instrument of assignment from Texas Commerce Bank. DFAS then withheld payments until it received proper notice of the assignment, which, according to defendant, occurred on July 24, 1996, the date that DFAS received the Notice of Assignment and a copy of the instrument of assignment directly from Texas Commerce Bank.

On September 10, 1996, defendant disbursed the rental payments for the months of June and July 1996, and included an interest payment of $6,899.98 for the late payment of rent.[10] With regard to the late rental payments, defendant believed that pursuant to the lease, interest did not begin to accrue until thirty days after July 24, 1996, the date it received the Notice of Assignment and instrument of assignment from Texas Commerce Bank. Plaintiff, however, asserts the June lease payment was due on July 1, 1996, and the July lease payment was due on August 1, 1996, thereby entitling it to an additional $14,354.17 in interest. By a letter dated March 25, 1997, plaintiff sought a final decision from the CO upon its demand for the additional interest for the months of June and July 1996. The CO issued a final decision on April 28, 1997, stating that the responsibility for remittance of monthly rental payments rested with DFAS, and that he had no authority to determine whether DFAS owed additional interest.

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10. The payment covered two invoices, each constituting $3,449.99.

Appendix B

On June 13, 1997, plaintiff filed a complaint in this court, seeking reimbursement for the SWSC it has paid to date, a declaratory judgment that defendant is responsible for the SWSC over the remaining term of the lease, and additional interest on the alleged late rental payments. Plaintiff filed its motion for summary judgment on March 4, 1998, asserting the SWSC is a charge for the use and occupancy of the premises, and not a special assessment tax, and therefore, is defendant's obligation to pay. Plaintiff also claims defendant owes $14,354.17 in additional interest. On April 30, 1998, defendant filed its cross-motion for summary judgment, claiming the SWSC is a special assessment tax, and thus, plaintiff's obligation to pay. Defendant also avers that a proper notice of the assignment of lease payments from plaintiff to Texas Commerce Bank did not occur until DFAS received notice of the assignment as required by the Assignment of Claims Act, 31 U.S.C. § 3727 (1994), and the Assignment of Contracts Act, 41 U.S.C. § 15 (1994). According to defendant, this did not occur until July 24, 1996. Thus, defendant asserts it paid the correct amount of interest. On September 14, 1998, the court heard oral argument on the parties' motions.

Discussion

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. **RCFC** 56(c); ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 247 (1986); ***Jay v. Secretary, DHHS***, 998 F.2d 979 (Fed. Cir. 1993). A fact is material if it might significantly affect the outcome of the suit under the governing law. ***Anderson***, 477 U.S. at

248. The party moving for summary judgment bears the initial burden of demonstrating the absence of any genuine issue of material fact. ***Celotex Corp. v. Catrett***, 477 U.S. 317, 325 (1986). If the moving party demonstrates an absence of a genuine issue of material fact, the burden then shifts to the nonmoving party to show that a genuine issue exists. ***Sweat Fashions, Inc. v. Pannil Knitting Co.***, 833 F.2d 1560, 1563 (Fed. Cir. 1987). Alternatively, if the moving party can show that there is an absence of evidence to support the nonmoving party's case, then the burden shifts to the nonmoving party to proffer such evidence. ***Celotex***, 477 U.S. at 325.

The court must resolve any doubts about factual issues in favor of the nonmoving party, ***Litton Indus. Prods., Inc. v. Solid State Sys. Corp.***, 755 F.2d 158, 163 (Fed. Cir. 1985), to whom the benefits of all the inferences and presumptions run. ***H.F. Allen Orchards v. United States***, 749 F.2d 1571, 1574 (Fed. Cir. 1984), *cert. denied*, 474 U.S. 818 (1985). The fact that both parties have moved for summary judgment does not relieve the court of its responsibility to determine the appropriateness of summary disposition. ***Prineville Sawmill Co. v. United States***, 859 F.2d 905, 911 (Fed. Cir. 1988) (citing ***Mingus Constructors, Inc. v. United States***, 812 F.2d 1387, 1391 (Fed. Cir. 1987)). Summary judgment will not necessarily be granted to one party or another simply because both parties moved for summary judgment. ***Corman v. United States***, 26 Cl. Ct. 1011, 1014 (1992) (citing ***LewRon Television, Inc. v. D.H. Overmeyer Leasing Co.***, 401 F.2d 689, 692-93 (4th Cir. 1969), *cert. denied*, 393 U.S. 1083 (1969)). A cross-motion is a party's claim that it alone is entitled to summary judgment. ***A Olympic Forwarder,***

Inc., v. United States, 33 Fed. Cl. 514, 518 (1995). It therefore does not follow that if one motion is rejected, the other is necessarily supported. ***Id.*** Rather, the court must evaluate each party's motion on its own merit and resolve all reasonable inferences against the party whose motion is under consideration. ***Id.*** (citing ***Corman***, 26 Cl. Ct. at 1014).

This court has jurisdiction over plaintiff's complaint pursuant to the Contract Disputes Act, 41 U.S.C. § 609(a) (1994). The parties present this court with two issues for decision: (1) which party is obligated under the lease to pay the SWSC; and (2) whether defendant's rent payments for June and July 1996 were late under the terms of the lease.

I. *Solid Waste Service Charge*

The first issue presents the court with questions of contract interpretation. The court may rule on such interpretations as a matter of law. ***National Rural Utilities Coop. Finance Corp. v. United States***, 14 Cl. Ct. 130, 136 (1988), *aff'd*, 867 F.2d 1393 (Fed. Cir. 1989). Contract interpretation ordinarily begins with the plain meaning of the provision in question. ***S.W. Aircraft Inc. v. United States***, 551 F.2d 1208, 1212 (Ct. Cl. 1977). The court must construe the contract by its plain and unambiguous language. ***National Rural***, 14 Cl. Ct. at 136. "The language of a contract must be given that meaning that would be derived from the contract by a reasonable intelligent person acquainted with the contemporaneous circumstances." ***Hol-Gar Mfg. Corp. v. United States***, 351 F.2d 972, 975 (Ct. Cl. 1965). "Generally, the plain language of a contract controls, and only language which is reasonably susceptible to more than one meaning

may be considered ambiguous." ***Thermal Electronic, Inc. v. United States***, 25 Cl. Ct. 671, 673 (1992) (*citing* ***Neal & Co. v. United States***, 19 Cl. Ct. 463, 471 & n. 4 (1990), *aff'd*, 945 F.2d 385 (Fed. Cir. 1991); ***John C. Grimberg Co. v. United States***, 7 Cl. Ct. 452, 457 (1985), *aff'd*, 785 F.2d 325 (Fed. Cir. 1985). An ambiguity does not exist simply on the basis that the parties assert different interpretations of the contract. ***Thermal***, 25 Cl. Ct. at 673.

In interpreting a contract, the court seeks to "effectuate its spirit and purpose." ***Gould, Inc. v. United States***, 935 F.2d 1271, 1274 (Fed. Cir. 1991) (quoting ***Arizona v. United States***, 575 F.2d 855, 863 (Ct. Cl. 1978)). A court must give reasonable meaning to all parts of the contract "so as to harmonize and give meaning to all its provisions," and not render portions of the contract meaningless. ***Thanet Corp. v. United States***, 591 F.2d 629, 633 (Ct. Cl. 1979); *see also* ***Fortec Constructors v. United States***, 760 F.2d 1288, 1292 (Fed. Cir. 1985). Furthermore, "an interpretation which gives a reasonable meaning to all parts will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous, or achieves a weird and whimsical result." ***Arizona***, 575 F.2d at 863.

In the case at bar, there is disagreement as to which party is responsible for the SWSC. Plaintiff contends that the SWSC is a maintenance cost, and therefore, it is defendant's obligation to pay under the lease. Plaintiff further contends that the lease, together with the RFP, which the lease incorporates by reference, demonstrates the parties' intent for defendant to pay the SWSC. Conversely, defendant maintains the SWSC is a special assessment tax, and therefore, it is plaintiff's obligation to pay.

Appendix B

The first page of the RFP, which summarizes the project, states "the maximum annual rental does not include utility consumption and property maintenance costs, which will be paid by the government."[11] The RFP further states: "[f]ollowing issuance of the Certificate of Acceptance for the entire premises by the government, selection of a private waste collection firm for [waste collection] services (including rental of dumpsters) will be contracted by the government under the maintenance contract for this project."[12] In addition, the lease provides:

> The Government intends to use the leased premises for residential occupancy by Government personnel. At its sole cost and expense, the Government shall provide for the operation of the Premises and perform all maintenance, repairs, replacement, rehabilitation, and redecoration as the Government in its discretion determines necessary (with the exception of Lessor provided landscape "maintenance as described on page E-17, paragraph (8) Landscaping (as amended), of the RFP, warranty items and" portions of utilities normally maintained by utility providers).[13]

Although neither party disputes that the expense of removing trash itself is a cost of maintenance, they dispute

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11. Request for Proposal (RFP), filed Sept. 22, 1998, at i.

12. ***Id.*** at E-22.

13. Pl.'s Mot., Ex. A, at 19.

whether the SWSC was intended as a cost of maintenance. Plaintiff contends the SWSC is included in the cost associated with solid waste collection and removal from the facility. At oral argument, plaintiff stated:

> [T]he bargain between the parties as envisioned by the RFP on which our proposal is based and the lease agreement which codifies the terms of the agreement between the two parties, is founded on the premise that the developer will not have to contend with solid waste disposal . . . .[14]

In addition, plaintiff asserts that if no SWSC was in place, defendant would be responsible for paying these fees under the maintenance provision of the lease. Although defendant concedes this point, it disputes that the SWSC is included as a maintenance cost. With regard to its position, defendant stated at oral argument: "the contractual role of the Government with respect to utility services is that of a consumer, not a property developer,"[15] and the SWSC is assessed against the property owner. Further, defendant stated that as a consumer, it was already paying for the waste disposal for which it contracted.

It is clear from the language of the lease and the RFP that the parties intended defendant to pay for the removal of solid waste from the Facility. Additionally, at the time the parties entered the lease, tipping fees were used as the sole means by which the County charged for the use of its landfills

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14. Oral Argument Transcript (Tr.) at 13.

15. ***Id.*** at 33.

and for funding its solid waste programs. Moreover, the parties agree it was their intention for defendant to pay these tipping fees. Plaintiff asserts, however, that the SWSC is still a tipping fee, regardless of the name used, and therefore, is still defendant's responsibility to pay.

The record demonstrates that tipping fees are still used by the County. First, in a letter dated May 17, 1996, from the Director of the County DER to plaintiff, Mr. Wynkoop stated "[b]ecause the County can no longer fund the costs associated with its solid waste programs *solely* from tipping fee revenues, several service charges have been implemented to *help fund* the system."[16] Second, in a letter dated January 9, 1997, the CO informed Mr. Pyke "the [SWSCs] *are not a replacement* for County landfill tipping fees. The tipping fees are paid by the contracted trash collector."[17] Finally, in letter to Mr. Wynkoop, dated February 4, 1997, Mr. Pyke asserted "by shifting these fees to homeowners, the County is able to charge lower tipping fees . . ."[18]

Because tipping fees continue to be used by the County, defendant would still be responsible for their payment as a cost of maintenance. It is possible, however, that Priority One might dispose of the Facility's refuse in another county. Yet irrespective of where Priority One disposes of the Facility's refuse, the County would still assess the SWSC against plaintiff. It is therefore axiomatic that the SWSC can not be a tipping fee for which defendant is responsible.

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16. Pl.'s Mot., Ex. K, at 1. (emphasis added).

17. ***Id.***, Ex. W (emphasis added).

18. ***Id.***, Ex. X.

Appendix B

The parties next dispute whether the SWSC is a tax. The lease specifically allocates the payment of certain taxes to each of the parties. Article III of the lease, entitled "Tax Increases," provides that "[a]fter completion of the second full year following the date of issuance of the Certificate of Acceptance for the entire Premises, the Government shall pay all general real estate tax increases."[19] The lease defines "general real estate taxes" as:

> taxes which are assigned on an *ad valorem* basis, without regard to benefit to the property, for the real purpose of funding general governmental services. The term . . . shall exclude any fines, interest or penalty for nonpayment, but shall include any discount offered for prompt payment whether the Lessor has taken advantage of it or not.[20]

The lease further provides "the Lessor shall be responsible to pay all taxes, general or special, all public rates, dues and *special assessments* of every kind which may become due and payable or which are to be assessed against or levied upon said premises during the term of the lease."[21]

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19. ***Id.***, Ex. A, at 4.

20. ***Id.***, Ex. A, at 4. Black's law dictionary defines "ad valorem tax" as "a tax imposed upon the value of or property." BLACKS LAW DICTIONARY 51 (6th Ed. 1990).

21. Pl.'s Mot., Ex. A, at 20. (emphasis added).

The lease, however, does not define the term "special assessment." In light of this omission, both parties have focused on Maryland law for clarification. Generally, extrinsic evidence may not be used unless an ambiguity is identified in the contract language. ***City of Tacoma v. United States***, 31 F.3d 1130, 1134 (Fed. Cir. 1994). A court, however, may use extrinsic evidence for the limited purpose of shedding light on the parties' objective intent by clarifying the meaning of terms found within the four corners of the contract. *See* ***Applied Companies v. United States***, 37 Fed. Cl. 749, 759 (1997). It is clear that the parties intended that state law would affect the lease:

> [T]he Lessor will at all times during the existence of this lease comply, at its sole cost and expense, with the provisions of any and all federal, state and local statutes, ordinances, rules, and regulations which may be applicable to the Lessor.[22]

Additionally, a special assessment tax passed by the state of Maryland, or any County, is a law to which plaintiff would be subject. The above contractual provision, when read together with Article III of the lease, which pertains to tax increases, clearly evidences the parties' anticipation that state and county taxes would arise and affect the contractual obligations of the parties. Thus, it is reasonable to conclude that the parties intended the use of state law to aid in the construction of the lease. Accordingly, such extrinsic evidence will aid in the clarification of the term "special assessment."

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22. ***Id.*** at 32.

Appendix B

Under Maryland law, a special assessment tax is a "tax levied occasionally as may be required upon a limited class of persons interested in local improvement, and who are presumed to be benefitted by the improvement over and above the ordinary benefit which the community in general derive from the expenditure of money." ***Williams v. Anne Arundel County***, 638 A.2d 74, 78 (Md. 1994) (quoting ***Gould v. Mayor & City Council of Baltimore***, 59 Md. 378, 380 (1883)). "In order to justify a special assessment for local improvement, however, there must be both a public purpose and a special benefit to the property assessed over and above that accruing to the public." ***Montgomery County v. Schultze***, 489 A.2d 16, 19 (Md. 1985). "Special assessments are thus imposed because the improvements for which the assessment is levied cause an enhancement of the property value with no pecuniary loss suffered by the property owner." ***Id.*** at 20 (citing ***Pumphrey v. County Comm'rs of Anne Arundel County***, 130 A.2d 297 (Md. 1957).

Plaintiff alleges the SWSC can not be a special assessment because it is not assessed on an *ad valorem* basis. Plaintiff supports its argument with an opinion letter from the Office of the Attorney General of the State of Maryland, wherein Richard Israel, Assistant Attorney General, determined the SWSC is a flat charge and not a property tax.[23] Plaintiff further supports its argument with the affidavit

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23. In that letter, Mr. Israel examined whether the SWSC fell within a property tax exemption accorded to disabled veterans and their spouses. In determining that the SWSC was not a property tax, he concluded that the SWSC did not fall within the property tax exemption. He did not determine, however, that the SWSC was not a special assessment tax. Pl.'s Mot., Ex. X.

of Leslie Romine, local counsel for plaintiff, in which she attests "the solid waste charge is not an *ad valorem* tax, which is the required method for assessing a valid solid waste service charge."[24] Thus, plaintiff concludes that because the SWSC is neither a property tax nor an *ad valorem* tax, it must be a charge for the occupancy of the premises.[25]

Chapter 802 of the Laws of Maryland of 1965 provides:

> Special assessment taxes levied by the board for the costs of garbage and trash collection, removal and disposition, including site acquisition and operation shall be by an ad valorem tax against all of the properties assessed for county tax purposes within the area receiving trash and garbage removal and disposition service. The Board may in its discretion prescribe the method of payment and the rate of tax for the costs of the collection, disposition, removal and disposition of the trash and garbage as follows: the basis of

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24. ***Id.***, Affidavit (Aff.) of Leslie Romine, at 2, ¶ 12.

25. Plaintiff also alleges that the SWSC is a cost of operating the premises. In support of this argument plaintiff submits the affidavit of Thomas Houff, Supervisor of Assessment in Prince George's County Office of State Department of Assessments and Taxation, in which Mr. Houff states his office permits the SWSC to be included as an operating expense for income producing properties. ***Id.***, Aff. of Thomas Houff, at 2, ¶ 7. This argument is inapposite. Even if Mr. Houff's statement is true, it still ignores the fact that the County determined that levies on solid waste disposal would be by a special assessment tax.

> said tax to be the total costs of said service divided by the number of units served . . . .

1965 Md. Laws Ch. 802(c)(2).

This authority to levy the special assessment was delegated to the County, as the identical provision is found in that County's Code. The Code provides in relevant part:

> (b) The special assessment taxes levied by the Council for the costs of garbage and trash collection, removal and disposition, including site acquisition and operation shall be by an ad valorem tax against all of the properties assessed for County tax purposes within the area receiving trash and garbage removal and disposition service. The Council may in its discretion prescribe the method of payment and the rate of tax for the costs of the collection, removal and disposition of the trash and garbage as follows: the basis of said tax to be the total costs of said service divided by the number of units served. The Council may vary the tax rate as between individual residential units and commercial establishments. Such decision as to any variance for such service by the Council shall be conclusive.

Prince George's County, Md., Code § 2-375(b) (Supp. 1996).

In addition, the statute further provides:

> (1) the special assessment tax rate for garbage and trash disposition and the acquisition and

> operation of a site or sites for the disposition of such garbage and trash shall be established on a *per unit basis*.
>
> (2) the special assessment tax rate for garbage and trash disposition and the acquisition and operation of a site or sites for the disposition of such garbage and trash for residential and commercial uses shall be based on the amount of garbage and trash anticipated to be generated by each type of use. The County Executive shall collect appropriate data, analyze waste generation, and recommend a reasonable system of rates and charges for adoption by the Council in conjunction with the adoption of the annual operating budget.

Section 2-375(b)(1) & (2) (emphasis added).

It is clear that these statutory provisions require that a special assessment tax be used as a levy for the collection, removal and disposition of trash. Plaintiff's contention that a special assessment tax *must* be levied on an *ad valorem* basis is misplaced. To the contrary, the cited text of the statutes permits special assessments to be levied on a per unit basis. Indeed, the SWSC at issue was levied on such a basis. Thus, the court finds that the SWSC is a special assessment tax. Accordingly, the plain language of the lease places the obligation to pay special assessment taxes on plaintiff.

Plaintiff, however, alleges that the SWSC can not be a special assessment tax because it would be impossible to

show the Facility derives any special benefit from the County landfills. Plaintiff further asserts that if any entity receives a special benefit, it is the tenants and not the property itself, that actually receives the benefit.

In ***Pumphrey v. County Comm'rs of Anne Arundel County***, 130 A.2d 297 (Md. 1957), Anne Arundel County established garbage zones and assessed service charges against each household and commercial unit in those zones for the removal of garbage, ashes, trash and other waste materials. The charges were levied to defray the cost of removing these waste materials. ***Id.*** at 298. The plaintiff, a landlord, asserted there was no basis for charging him, rather than his tenants, because the tenants received the special benefit. ***Id.*** The plaintiff also asserted he received no special benefit because his units were all rented at the time the service charge was implemented. ***Id.*** at 299. The Maryland Court of Appeals, however, held "it could hardly be argued that the value and chances for rental of the residential properties are not increased by a public disposal system." ***Id.*** at 300.[26]

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26. Plaintiff seeks to distinguish ***Pumphrey*** by asserting that there was no evidence that such a charge existed before the special assessment was instituted, and therefore, the court had to find there was a special benefit. This is immaterial. Whenever a legislature passes a special assessment, by definition that special assessment must confer a special benefit upon the property assessed. *See* ***Montgomery County v. Schultze***, 489 A.2d at 20. Additionally, Maryland courts presume the property received a special benefit. ***V.F.W. v. Montgomery County***, 115 A.2d 249, 252 (Md. 1955). Plaintiff also seeks to distinguish ***Pumphrey*** by arguing that in the case at bar all the units are rented for twenty years, and thus no

(Cont'd)

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The court notes that the determination of whether to impose a special assessment is left to the County legislature. *See* ***Mayor and Council of Rockville v. Woodmont Country Club***, 705 A.2d 301, 306 (Md. 1998) ("The determination of whether to impose a special assessment and the mode of imposing a special assessment are legislative determinations"). Moreover, there is a presumption that local improvements specifically benefit the properties that have been assessed. ***V.F.W. v. Montgomery County***, 115 A.2d 249, 254 (Md. 1955); *see also* ***Sulzer v. Montgomery County***, 484 A.2d 285, 291 (Md. App. 1984) (presumption that the legislative determination is correct). Thus, it is clear that the determination of whether the Facility receives a special benefit is within the discretion of the County legislature. Additionally, ***Pumphrey*** casts no doubt that a public landfill may provide a special benefit upon properties assessed.

Alternatively, plaintiff asserts that if the court finds the SWSC is a special assessment tax, this issue falls within the exceptions discussed in ***Alvin, Ltd. v. United States Postal Service***, 816 F.2d 1562 (Fed. Cir. 1987) and ***Wright Runstad Properties Ltd. Partnership v. United States***, 40 Fed. Cl. 820 (1998). In effect, plaintiff contends that the SWSC is the same charge as the tipping fees, but only in a different form with a different name.

(Cont'd)
benefit inures to the Facility. The court in ***Pumphrey***, however, concluded the landlord's property received a special benefit despite the fact that all of the landlord's units were currently rented out to tenants. ***Id.*** at 300.

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Alvin involved lease agreements between thirty limited partnerships (plaintiffs) and the Postal Service, which required the plaintiffs to pay for special assessment taxes and the Postal Service to pay general real estate taxes. ***Alvin***, 816 F.2d at 1563. After the lease periods began, a change in the California Constitution mandated that *ad valorem* taxes on property could not exceed one percent of the property's assessed value, thus requiring numerous communities to invoke alternative methods of revenue collection. ***Id.*** at 1563. The United States Court of Appeals for the Federal Circuit noted that the Postal Service normally would not be responsible for the payment of the special assessments. ***Id.*** at 1565. The court recognized, however, that the Postal Service Board of Contract Appeals found the new special assessments levied against the plaintiffs' properties succeeded the levies that the parties intended would be borne by the Postal Service. ***Id.*** Hence, the court held that "the Postal Service's undertaking to pay general real estate taxes requires the payment of those levies that succeeded the general real estate taxes, however these successor taxes are denominated." ***Id.*** at 1566. According to the Federal Circuit, "such payment reinstates the original bargain, as it was understood by both the Postal Service and the lessors." ***Id.***

Wright Runstad Ltd. Partnership similarly involved a dispute regarding the payment of a special assessment tax, the purpose of which was to fund a tunnel in Seattle, Washington. ***Wright***, 40 Fed. Cl. at 822. The court, however, determined that the exception in ***Alvin*** did not apply because "the special assessment was a one time charge," and "[its] purpose . . . was to pay for the tunnel rather than general government services previously funded by ad valorem real estate taxes." ***Id.*** at 826.

Plaintiff contends the exception discussed in these cases is applicable and thus resolves this issue. At oral argument plaintiff stated:

> Our parallel between [***Alvin***] and this case is, it was a tipping fee. Once one, it's still one. We don't care what you call it. We don't care what it's labeled. It's clear as a bell that tipping fee was supplanted by the solid waste service charge, and it was supplanted for it and for one purpose only, and that is to fund that service.[27]

In ascertaining whether a change in law may be accommodated, the original intent of the parties must be considered. ***Alvin***, 816 F.2d at 1565. As discussed, it is clear from the lease that the parties intended defendant would pay for solid waste removal under the maintenance clause of the lease. Unlike ***Alvin***, however, the original tipping fees were not replaced by the SWSC. Rather, plaintiff's own documents demonstrate that the County continues to charge tipping fees. Moreover, these successor taxes have supplemented, not replaced, the tipping fees. Hence, the parties' original intent can be realized, because defendant would be required to pay the same form of fee it did before the SWSC was implemented. To apply the ***Alvin*** exception would require defendant to pay for a special assessment tax, in this case the SWSC, and the tipping fees. Such a result, however, would not "reinstate the initial bargain of the parties," ***Alvin***, 816 F.2d at 1566, but instead would allow plaintiff to receive more than it bargained for. The parties intended plaintiff to

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27. Tr. at 23.

pay any special assessment taxes levied, and plaintiff bore that risk under the lease. Accordingly, plaintiff is the appropriate party to pay the SWSC.

II. *Late Interest Payments*

Although the parties do not dispute that defendant's June and July 1996 rental payments were late, they dispute: (1) when proper notice of the assignment was given; (2) the actual date the rental payments were due; and (3) the amount of interest owed on those payments. Article XIX of the lease provides:

> The Lessor, under the Assignment of Claims Act, as amended, 31 U.S.C. § 3727, 41 U.S.C. § 15 . . . may assign its rights to be paid amounts due or amounts to become due as a result of the performance of this lease to a bank, trust company, or other financing institution, including any Federal lending agency . . . .[28]

The Assignment of Claims Act, 31 U.S.C. § 3727, provides:

> (a) In this section, "assignment" means —
>
> > (1) the transfer or assignment of any part of a claim against the United States Government or of an interest in the claim; or

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28. Pl.'s Mot., Ex. A, at 32. The lease refers to both statutes as the "Assignment of Claims Act."

> (2) the authorization to receive payment for any part of the claim.

(b) An assignment may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued. The assignment shall specify the warrant, must be made freely, and must be attested to by 2 witnesses. The person making the assignment shall acknowledge it before an official who may acknowledge a deed, and the official shall certify the assignment. The certificate shall state that the official completely explained the assignment when it was acknowledged. An assignment under this subsection is valid for any purpose.

(c) Subsection (b) of this section does not apply to an assignment to a financing institution of money due or to become due under a contract providing for payments totaling at least $1,000 when —

. . . .

> (3) the assignee files a written notice of the assignment and a copy of the assignment with the contracting official or the head of the agency, the surety on a bond on the contract, and any disbursing official for the contract.

31 U.S.C. § 3727 (1994).

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The Assignment of Contracts Act, 41 U.S.C. § 15, provides:

(a) Transfer

No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States.

(b) Assignment

The provisions of subsection (a) of this section shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency, provided:

. . . .

(3) That, in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of the assignment with —

(A) the contracting officer or the head of his department or agency;

(B) the surety or sureties upon the bond or bonds, if any, in connection with such contract; and

(C) the disbursing officer, if any, designated in such contract to make payment.

41 U.S.C. § 15 (1994).

These statutes operate to invalidate transfers of government contracts or claims against the government. ***United California Discount Corp. v. United States***, 19 Cl. Ct. 504, 507 (1990). They were enacted in order to allow the government to deal exclusively with the original claimant, and enable the government to be aware of its obligations. ***Patterson v. United States***, 354 F.2d 327, 329 (Ct. Cl. 1965). Each statute contains a financial institution exception. This financial institution exception makes it easier for government contractors to secure financing for carrying out obligations to the government to the extent that government contracts might be speedily and effectively performed. ***Waxman v. United States***, 112 F. Supp. 570, 588 (Ct. Cl. 1953). Courts have held the financial institution exception must be strictly construed. *See* ***American Fin. Assoc., Ltd. v. United States***, 5 Cl. Ct. 761, 768 (1984), *aff'd*, 755 F.2d 912 (Fed. Cir. 1985); *accord* ***United California Discount Corp.***, 19 Cl. Ct. at 507; ***Trust Co. Bank of Middle Georgia, N.A. v. United***

States, 24 Cl. Ct. 710, 711-12 (1992). Thus, a contractor must meet the requirements of these sections in order to gain the benefit of the exception. ***United California Discount Corp.***, 19 Cl. Ct. at 507.

Plaintiff alleges its December 19, 1995 letter, which instructed defendant to remit all rental payments and other sums due under the lease directly to the Texas Commerce Bank, constituted proper notice of the assignment. Plaintiff argues that it complied with the Assignment of Contracts Act because no disbursing official was named in the lease prior to the unilateral modification issued on April 18, 1996. Plaintiff contends that defendant acknowledged receipt of the Notice of Assignment to the Texas Commerce Bank. Accordingly, plaintiff asserts the interest payments should be calculated for June from July 2 to September 10, 1996, and for July from August 2 to September 10, 1996.

Defendant avers that the Notice of Assignment was not perfected until July 24, 1996, the date Texas Commerce Bank provided the appropriate assignment documents to DFAS. Although defendant admits that DFAS was not listed in the lease until the unilateral modification on April 18, 1996, it asserts that plaintiff failed to comply with the Assignment of Claims Act because it was aware that DFAS was the disbursing office that paid Hunt, and therefore knew that DFAS was the disbursing office *to the contract*.[29] Defendant also alleges DFAS properly withheld payment until Texas Commerce Bank, on behalf of plaintiff, perfected the

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29. While the parties' dispute centers on the different language of each statute, the differing language does not affect the outcome under the facts of this case.

assignment. Defendant further alleges that because plaintiff did not strictly comply with the statute, interest did not begin to accrue until a reasonable time after all documents necessary to perfect the assignment had been received.

Plaintiff's December 19, 1995 letter to the CO did not constitute proper notice of the assignment. Both the Assignment of Claims Act and the Assignment of Contracts Act require the assignee to file written notice of the assignment and a copy of the instrument of assignment with the CO. Texas Commerce Bank, however, provided proper notice of the assignment to the CO, because it submitted both the Notice of Assignment document and the instrument of assignment. As mentioned, the CO acknowledged receipt of these documents on August 25, 1993. Although defendant does not argue that Texas Commerce Bank failed to provide proper notice of the assignment to the CO, it contends that Texas Commerce Bank failed to provide proper notice of the assignment to DFAS.

"It is well established . . . that the Government can waive the statutory prohibitions against the assignment of contract rights if the contracting officer gives clear assent to the assignment." ***D & H Distributing Co. v. United States***, 102 F.3d 542, 546 (Fed. Cir. 1996) citing ***Tuftco Corp. v. United States***, 614 F.2d 740, 745-46 (Ct. Cl. 1980) (holding that in limited circumstances the government can waive the notice provisions and recognize an assignment even when the contractor does not comply with those provisions). Courts may allow a transfer to stand if the underlying purpose of the statute is not impinged. ***United Int'l Investigative Services v. United States***, 26 Cl. Ct. 892, 898 (1992), *rev'd on other grounds*, 109 F.3d 734 (Fed. Cir. 1997). For

example, the transfer of government contracts should be upheld if the government recognizes it either expressly, as by novation, or implicitly, as by ratification or waiver. ***Id.***

In ***Norwest Bank of Arizona, N.A. v. United States***, 37 Fed. Cl. 605, 606 (1997), the CO modified a contract to name the contractor's bank as payee. The court held that the CO's actions demonstrated an express agreement to pay the bank, and thus waived any defects with the technical requirements of the Assignment of Claims Act and the Assignment of Contracts Act. ***Id.*** at 610; *see also* ***D & H Distributing***, 102 F.3d at 547 (holding that the CO assented to the transfer of rights under the contract by modifying the contract to include a joint payment agreement).

Just as in ***Norwest Bank of Arizona***, the CO in this case also modified the contract, directing DFAS to make rental payments to Texas Commerce Bank. Additionally, that modification incorporated the Notice of Assignment document signed by Texas Commerce Bank. "A complete . . . assignment of the right to be paid the proceeds of the contract imposes an obligation on the promisor, once it has received notice of the assignment, to make payments under the contract in accordance with that assignment." ***D & H Distributing***, 102 F.3d at 547. Thus, by modifying the contract to name Texas Commerce Bank as assignee and to incorporate the Notice of Assignment document, the "government expressly agreed to the assignment directing payments to the bank," ***Norwest Bank of Arizona***, 37 Fed. Cl. at 610, thereby waiving any defects with the requirements of the Assignment of Claims Act and Assignment of Contracts Act.

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The lease provides that "[r]ent . . . shall be paid monthly in arrears and will be due on the first workday of each month, and only as provided for by this lease."[30] Additionally, in the event that a rent payment is late, defendant automatically must pay interest on the amount outstanding. The court finds that the June 1996 rental payment was due on July 1, 1996, and the July 1996 renal payment was due on August 1, 1996. Therefore, defendant is liable for interest for the additional days that the rental payments were late.[31]

Conclusion

For the above stated reasons, the court concludes the SWSC is a special assessment tax, and therefore, plaintiff is responsible for its payment. In addition, by modifying the contract to designate Texas Commerce Bank as the payee, defendant expressly agreed to the assignment and waived any defects with the Assignment of Claims Act and Assignment of Contracts Act. Accordingly, the court grants defendant's motion for summary judgment on the issue of the SWSC, and denies plaintiff's cross-motion. In addition, the court grants plaintiff's motion for summary judgment on the issue of additional interest in the amount of $14,354.17, and denies defendant's cross-motion. The Clerk is directed to enter judgment pursuant to this opinion. No costs.

IT IS SO ORDERED.

s/ Bohdan A. Futey
BOHDAN A. FUTEY
Judge

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30. Pl.'s Mot., Ex. A, at 45.

31. Plaintiff claims $14,354.17 in additional interest, and defendant has not challenged this amount.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED FEBRUARY 9, 2000

ORDER

A combined petition for rehearing and petition for rehearing en banc having been filed by the APPELLANT, and a response thereto having been invited by the court and filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on February 16, 2000.

FOR THE COURT,

s/ Jan Horbaly (AV)
Jan Horbaly
Clerk

Dated: February 9, 2000

SUMMERFIELD HOUSING V US, 99-5033
(CFC – 97-CV-423)